

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

LOIS PETROLITO, et al.	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	3:03CV1085 (CFD)
1st NATIONAL CREDIT SERVICES	:	
CORP.,	:	
Defendant.	:	

**RULING ON PLAINTIFF'S MOTION FOR JUDGMENT UPON DEFAULT**

**I Background**

On August 10, 2004, this Court denied the plaintiffs' motion for default judgment on the ground that the plaintiffs had failed to effectuate proper service upon the out of state defendant, 1st National Credit Services Corporation. Specifically, the Court found that mailing the summons and complaint by certified mail to the defendant's offices in Florida by an "indifferent person" did not comply with Connecticut state law concerning service of process, which was made applicable to this action by Fed. R. Civ. P. 4(e)(1).<sup>1</sup> In so ruling, this Court granted the plaintiffs until September 10, 2004, to indicate the basis for jurisdiction over the defendant.

On August 12, 2004, the plaintiffs filed a memorandum on service of process, and claimed that the defendant had properly been served by the original mailing of the complaint by the indifferent person. The Court construes this memorandum as a motion for reconsideration of its ruling dated August 10, 2004. Therefore, the motion for reconsideration [**Doc. #11**] is

**GRANTED.** Upon reconsideration, this Court finds that the plaintiffs have once again failed to

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<sup>1</sup>Although the return of service indicates that the summons and complaint were mailed in this way, no supplemental return has been filed which demonstrates that the post card attached to the certified mail had been signed and returned.

demonstrate that the defendant was properly served, and, therefore, the action is **DISMISSED** without prejudice.

## **II Plaintiffs' Argument**

The plaintiffs' memorandum argues that, "[b]ecause of [Fed. R. Civ. P.] 4(c), and despite any provision of state law as to authority to serve, service by an indifferent person was proper." The Court interprets the plaintiffs' argument to be as follows: (1) although the pertinent Connecticut long-arm statute, Conn. Gen. Stat. § 33-929, determines the appropriate recipients of service for out of state corporate defendants, the relevant rule for determining who makes such service is Fed.R.Civ.P. 4(c)(2); (2) Federal Rule 4(c)(2) allows for service by any person who is over the age of 18 and not a party and, therefore, service by the "indifferent person" in this case was proper. For the reasons that follow, the Court rejects this argument, and finds that the plaintiffs have failed to demonstrate that the defendant was properly served.

## **III Service Upon Corporate Defendants Under Fed. R. Civ. P. 4.**

Fed.R.Civ.P. 4(h)(1) provides, in relevant part, that "service upon a domestic or foreign corporation . . . shall be effected . . . in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1) . . . ."<sup>2</sup> Rule 4(e)(1) provides, in relevant part, that service "may be effected in any judicial district of the United States . . . pursuant to the law

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<sup>2</sup>Rule 4(h)(1) also allows provides an alternative to following the state law for service upon a foreign corporation: "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Plaintiffs have not argued that service was sufficient under that portion of Rule 4(h)(1), most likely because it requires personal delivery to the agent or officer, and the return of service reflects it was mailed. See 1 Moore's Fed. Practice 3d. § 4.53[2]. It also should be noted that it is likely that "indifferent persons" under Fed. R. Civ. P. 4(c)(2) can properly make such service under this alternative method.

of the state in which the district court is located, or in which service was effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State." The plain language of Rule 4(e)(1) does not support the plaintiffs' argument, as it uses the all-encompassing term of "the law of the state" to define the rules under which service is to be effected, and there is no cross reference to Rule 4(c)(2), which permits service by an indifferent person under some circumstances.

In their memorandum on service of process, the plaintiffs cite a decision from this district involving service of process under Fed. R. Civ. P. 4, Goktepe v. Lawrence, 220 F.R.D. 8, 11 (D.Conn. 2004). In Goktepe, Judge Kravitz found that "any person who is authorized to effectuate service under Rule 4(c)(2) may deliver the summons and complaint referred to in Rule 4(e)(2), even if that person is not authorized to effect service under state law." In Goktepe, however, the plaintiff explicitly stated that she was relying on Rule 4(e)(2), and not Rule 4(e)(1). That distinction is critical because Rule 4(e) provides the method of service upon individuals. Subsection (1) of 4(e) prescribes the approach of invoking the state rule as to service upon individuals, while subsection (2) of 4(e) prescribes an alternative "federal" rule of service. Only subsection (1) of 4(e) was "borrowed" by 4(h) for service upon corporations. Judge Kravitz noted that subsection (2) of 4(e)—which was not borrowed for service upon corporations—provides that service can be effectuated by any party "authorized . . . by law," which, as Judge Kravitz pointed out, would include service by an indifferent person under Rule 4(c)(2). To the contrary, under subsection (1), service is limited to the manner provided in "the law of the state in which the district court is located." Accordingly, because of the important linguistic distinctions between subsections (1) and (2) of Rule 4(e), and because the plaintiffs in

this matter have relied on Rule 4(e)(1), Goktepe is not helpful to the plaintiffs.<sup>3</sup>

In sum, the Court finds that when attempting to serve a foreign corporation under Rule 4(h)(1), and therefore under Rule 4(e)(1), a plaintiff may not look to Rule 4(c) to determine who may properly make service, but rather must look to the relevant state rule. As noted in this Court's ruling dated August 10, 2004, the plaintiffs failed to comply with Connecticut law for service on a foreign corporation, and therefore the defendant was not properly served. Conn. Gen. Stat. § 52-50 requires that service must be made by a "state marshal, a constable, or other proper officer authorized by statute . . . ." This reflects the legislative intent that there be a greater assurance of proper service upon a defendant through the assistance of a state official.<sup>4</sup> See Peia v. U.S. Bankruptcy Courts, No. 3:00CV2310, 2001 WL 789201 (D.Conn., May, 22, 2001) (finding that the plaintiff had not complied with Rule 4(e)(1) and Conn. Gen. Stat. §52-57; "No such officer served the summons and complaint on defendant personally or by leaving it at his place of abode. Plaintiff's mere mailing of a copy of the summons and complaint to Defendant's residence is insufficient").<sup>5</sup>

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<sup>3</sup>As mentioned supra in footnote 2, Rule 4(h)(1) provides, like Rule 4(e)(2), for an alternative "federal" method of service, which likely could be made by an indifferent person. However, plaintiffs have not argued that the service here was made under that portion of Rule 4(h)(1).

<sup>4</sup>Although § 52-50 permits service by indifferent persons under limited circumstances, those circumstances are not present here.

<sup>5</sup>Rule 4(e)(1) provides that service may be effected pursuant to the law of either: (1) "the state in which the district court is located"; or (2) "the state . . . in which service was effected." As noted in the text of this ruling, the Court reaffirms its prior finding that the plaintiffs failed to comply with the rule used in Connecticut, the state in which this Court is located, for service of a foreign corporation. At no point have the plaintiffs claimed that service upon the defendant was proper because it complied with the rule used in Florida, the state "in which service was effected." Therefore, the Court will not address this issue.

## IV Disposition

Rule 4(m) provides: "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time." In the August 10, 2004 ruling, as well at subsequently held oral argument, this Court gave notice to the plaintiffs that failure to demonstrate proper service upon the defendant would lead to dismissal of their action. In addition, the plaintiffs have not requested an extension of the 120 day period for service permitted under Fed. R. Civ. P. 4(m) if good cause is demonstrated. Consequently, the Court dismisses the plaintiffs' action without prejudice.

SO ORDERED this 2<sup>nd</sup> day of February 2005, at Hartford, Connecticut.

/s/ CFD  
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**CHRISTOPHER F. DRONEY**  
**UNITED STATES DISTRICT JUDGE**

